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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re

JEROME CROSS,

On Habeas Corpus.

F072416

(Kings Super Ct. No. 14CM0828)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for writ of habeas corpus.

Jerome Cross, in pro. per., for Petitioner.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Ryan B. McCarroll and Julie A. Hokans, Deputy Attorneys General, for Respondent.

-ooOoo-

Petitioner Jerome Cross seeks permission to file a belated notice of appeal by way of a petition for writ of habeas corpus. This court grants petitioner's request.

On February 5, 2015, petitioner was sentenced to "9 years" for "possession of drugs or (alcohol) in [a] penal institution."

* Before Hill, P.J., Kane, J., and Smith, J.

The petition contains a declaration signed by petitioner and asserts to be true under penalty of perjury the following:

“While judge was reading over probationer officer’s report [trial counsel] asked me (off the record) did I want him to file my appeal. Of course I said ‘Yes.’ He never filed that appeal.”

Petitioner asserts that he did not discover that an appeal had not been filed until May 2015. On June 23, 2015, he attempted to file a notice of appeal but it was returned unfiled for being late.

This court sent an order to the Attorney General granting her the opportunity to file an informal response. The response was received on November 16, 2015, and concedes that petitioner has made a prima facie showing in this action.

A notice of appeal must be filed within 60 days after the judgment or order being appealed to confer appellate jurisdiction on this court. (Cal. Rules of Court, rule 8.308(a).) However, that duty may be delegated to counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719.) When applicable, the doctrine of constructive filing allows an untimely notice of appeal to be deemed timely if the defendant relied upon the promise of trial counsel to timely file a notice on the defendant’s behalf, and displayed diligence in seeing that his attorney has discharged that responsibility. (*In re Benoit* (1973) 10 Cal.3d 72.) The doctrine protects defendants who have been “lulled into a false sense of security” by counsel’s promise. (*Id.* at p. 87.) Reasonable doubt as to the veracity of a petitioner’s allegations in these matters are to be resolved in favor of the petitioner to protect the right of appeal rather than forfeit it on technical grounds. (Cf. *People v. Rodriguez* (1971) 4 Cal.3d 73, 79; see *In re Benoit, supra*, 10 Cal.3d at p. 89.)

Pursuant to the assertions in the petition in the above entitled action and the concession of the Attorney General that petitioner has made a prima facie showing of an entitlement to a belated appeal, this court concludes that petitioner’s affirmative response

on the date he was sentenced to counsel's question whether petitioner wanted to file an appeal constituted a constructive filing.

DISPOSITION

The Clerk/Administrator of this court is authorized to send a copy of the "NOTICE OF APPEAL – FELONY (DEFENDANT)," dated September 15, 2015, which is attached to the petition, to the Clerk of the Kings County Superior Court.

Let a writ of habeas corpus issue directing the Clerk of the Kings County Superior Court to file said notice of appeal in Kings County Superior Court action No. 14CM0828, to deem said notice to be timely filed, and to proceed with the preparation of the appropriate record on appeal in accordance with the applicable rules of the California Rules of Court.

Insofar as petitioner requests additional relief, said request is denied without prejudice because it is conclusional.